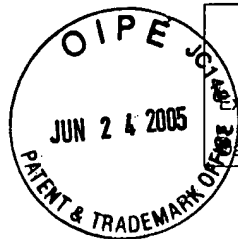


06-27-05

AP / 3761 TYP



**U.S.P.S. EXPRESS MAIL "POST OFFICE TO ADDRESSEE" SERVICE
DEPOSIT INFORMATION**

Express Mail Label No.: EV339773596USDate of Deposit: June 24, 2005

**BRINKS
HOFER
GILSON
& LIONE**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Appln. of: Earle Harry Sherrod et al.

Appln. No.: 09/825,609

Filed: April 3, 2001

For: **ABSORBENT INSERT FOR USE WITH AN
OUTER ABSORBENT GARMENT**

Examiner: Karin M. Reichle

Art Unit: 3761

Attorney Docket No: 659/695
K-C Ref. No. 14,897

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

TRANSMITTAL

Sir:

Attached is/are:

- ☒ Appeal Brief; check in the amount of \$500 for filing appeal brief
☒ Return Receipt Postcard

Fee calculation:

- ☐ No additional fee is required.
☐ Small Entity.
☐ An extension fee in an amount of \$_____ for a _____-month extension of time under 37 C.F.R. § 1.136(a).
☐ A petition or processing fee in an amount of \$_____ under 37 C.F.R. § 1.17(____).
☐ An additional filing fee has been calculated as shown below:

					Small Entity			Not a Small Entity	
	Claims Remaining After Amendment		Highest No. Previously Paid For	Present Extra	Rate	Add'l Fee	or	Rate	Add'l Fee
Total		Minus			x \$25=			x \$50=	
Indep.		Minus			X100=			x \$200=	
First Presentation of Multiple Dep. Claim					+\$180=			+ \$360=	
					Total	\$		Total	\$

Fee payment:

- ☒ A check in the amount of \$500 is enclosed for filing appeal brief.
☐ Please charge Deposit Account No. 23-1925 in the amount of \$_____. A copy of this Transmittal is enclosed for this purpose.
☐ Payment by credit card in the amount of \$_____ (Form PTO-2038 is attached).
☒ The Director is hereby authorized to charge payment of any additional filing fees required under 37 CFR § 1.16 and any patent application processing fees under 37 CFR § 1.17 associated with this paper (including any extension fee required to ensure that this paper is timely filed), or to credit any overpayment, to Deposit Account No. 23-1925.

Respectfully submitted,

Amanda M. Church
Amanda M. Church (Reg. No. 52,469)

June 24, 2005
Date



"Express Mail" mailing label number EV339773596US

Date of Deposit: June 24, 2005

Our Case No. 659/695

K-C Ref. No. 14,897

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:)	
)	
Earle Harry Sherrod et al.)	
)	Examiner Karin M. Reichle
Serial No. 09/825,609)	
)	Group Art Unit No. 3761
Filing Date: April 3, 2001)	
)	
For ABSORBENT INSERT FOR USE)	
WITH AN OUTER ABSORBENT)	
GARMENT)	

APPEAL BRIEF

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This Appeal is in response to the Final Rejection dated January 26, 2005.

I. REAL PARTY IN INTEREST

The real party of interest is Kimberly-Clark Worldwide, Inc. An assignment was recorded at Reel 012088, Frame 0651.

II. RELATED APPEALS AND INTERFERENCES

There are no pending appeals, interferences, or other judicial proceedings that may be related to, would directly affect or be directly affected by or have a bearing on the Board's decision in the pending Appeal.

III. STATUS OF CLAIMS

The status of the claims is as follows:

Claim 1-3, 6, 9, 12-14 and 18-22 are finally rejected under 35 U.S.C. § 103(a) for being obvious over Uni-Charm (EP 0945110 B1) in view of Matsuda et al. (U.S. Patent No. 3,612,054).

Claims 10-11 are finally rejected under 35 U.S.C. § 103(a) for being obvious over Uni-Charm and Matsuda et al. and further in view of Poulsen (U.S. Patent No. 2,929,379).

Claims 4, 5, 7, 8, and 15-17 have been cancelled.

The above-mentioned rejections of claims 1-3, 6, 9-14 and 18-22 are the subject of this Appeal.

The current claims are attached at the Claims Appendix.

IV. STATUS OF AMENDMENTS

A Request for Reconsideration was filed November 17, 2004 after Non-Final Rejection. The Final Rejection of January 26, 2005 indicated that this Request for Reconsideration was considered. No Amendment or Response has been filed in response to the January 26, 2005 Office Action prior to the filing of the present Appeal Brief.

V. SUMMARY OF CLAIMED SUBJECT MATTER

In one embodiment of the claimed invention, the claimed absorbent insert is shown as 10 (FIG. 1). (p. 4, l. 13-15). The absorbent insert is for use with an absorbent garment and configured to allow fluid to pass through the layers of the absorbent article to the absorbent garment. (p. 4, l. 15-16; FIG. 4). The insert includes a body-facing outer surface and a garment-facing outer surface. (p. 5, l. 12-14). The garment-facing outer surface is at least partially fluid permeable (p. 6, l. 28-30; p. 7, l. 2-3) and has a pore size that will readily allow the passage of liquids therethrough. (p. 7, l. 12-14).

The insert also includes at least one absorbent layer and one delay layer. (p. 6, l. 22-24; p. 7, l. 30-32). The absorbent layer has a first primary surface and a second primary surface. (p. 3, l. 2-3; p. 9, l. 32- p. 10, l. 6). The water insoluble (p. 11, l. 15-20) continuous (FIG. 4) fluid impermeable delay layer is adapted to substantially affect the flow of fluid passing through the insert. (p. 10, l. 15-22). The continuous fluid impermeable delay layer has a first primary surface and a second primary surface. (p. 3, l. 5-6; p. 9, l. 32- p. 10, l. 6). The surface area of each of the primary surfaces of the water insoluble continuous fluid impermeable delay layer is less than the surface area of each of the primary surfaces of the absorbent layers. (p. 12, l. 10-13). The delay layer is positioned between the absorbent layer and the garment-facing outer surface. (p. 11, l. 28-31).

In another embodiment of the claimed invention, the at least one absorbent layer of the absorbent insert (p. 3, l. 2-5) includes a first absorbent layer and a second absorbent layer. (p. 8, l. 18-20). Each primary surface of the first absorbent layer has a surface area less than the surface area of each primary surface of the second absorbent layer. (p. 9, l. 32 - p. 10, l. 3).

In yet another embodiment of the claimed invention, the second absorbent layer is positioned between the at least one delay layer and the first absorbent layer. (p. 11, l. 29-31; FIG. 4).

In another embodiment of the present invention, an absorbent insert for use with an absorbent garment is claimed. (p. 4, l. 13-16; FIG. 4). The insert

includes a body-facing cover layer and a garment-facing cover layer. (p. 6, l. 19-30). The garment-facing cover layer is at least partially fluid permeable and has a pore size that will readily allow the passage of liquids therethrough. (p. 7, l. 2-3, 12-14).

The insert also includes at least one absorbent layer having a first primary surface and a second primary surface. (p. 3, l. 2-3; p. 9, l. 32 - p. 10, l. 6). The at least one absorbent layer is positioned between the body-facing cover layer and the garment-facing cover layer. (p. 7, l. 30-32). The insert also includes at least one water insoluble continuous fluid impermeable delay layer having a first primary surface and a second primary surface. (p. 11, l. 15-20; FIG. 4; p. 3, 5-6). The at least one continuous fluid impermeable delay layer is adapted to substantially affect the flow of fluid through the insert (p. 10, l. 15-22) and is positioned between the body-facing cover layer and the garment-facing cover layer. (p. 11, l. 28-31).

The surface area of each of the primary surfaces of the at least one continuous fluid impermeable delay layer is less than the surface area of each of the primary surfaces of at least one of the absorbent layers. (p. 12, l. 10-13). The absorbent insert is configured to allow fluid to pass therethrough to the absorbent garment. (p. 4, l. 15-16; FIG. 4).

Another embodiment of the present invention is an absorbent system including an absorbent garment adapted to be worn by a user. (p. 4, l. 15-17). The absorbent garment has a body-facing surface and an outward-facing surface. (p. 4, l. 26-27). The system also includes an absorbent insert for use with the absorbent garment. (p. 5, l. 7-8). The insert is configured to allow the passage of fluid therethrough to the absorbent garment. (p. 5, l. 8-12; FIG. 4).

The insert includes a body-facing outer surface and a garment-facing outer surface. (p. 5, l. 12-14). The garment-facing outer surface is at least partially fluid permeable (p. 6, l. 28-30; p. 7, l. 2-3) and has a pore size that will readily allow the passage of liquids therethrough. (p. 7, l. 12-14).

The insert also includes at least one absorbent layer and one delay layer. (p. 6, l. 22-24; p. 7, l. 30-32). The absorbent layer has a first primary surface and

a second primary surface. (p. 3, l. 2-3; p. 9, l. 32- p. 10, l. 6). The water insoluble (p. 11, l. 15-20) continuous (FIG. 4) fluid impermeable delay layer is adapted to substantially affect the flow of fluid passing through the insert. (p. 10, l. 15-22). The continuous fluid impermeable delay layer has a first primary surface and a second primary surface. (p. 3, l. 5-6; p. 9, l.32- p. 10, l. 6). The surface area of each of the primary surfaces of the water insoluble continuous fluid impermeable delay layer is less than the surface area of each of the primary surfaces of the absorbent layers. (p. 12, l. 10-13). The delay layer is positioned between the absorbent layer and the garment-facing outer surface. (p. 11, l. 28-31).

There are no means-plus-function terms or step-plus-function terms in Claims 1-3, 6, 9-14 and 18-22. Claims 1-3, 6, 9-14 and 18-22 are argued separately below in Section VII.

VI. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

There are two grounds of rejection presented for review:

- 1) the rejection of claims 1-3, 6, 9, 12-14, and 18-22 for being obvious under 35 U.S.C. § 103(a) in view of Unicharm and Matsuda et al.; and
- 2) the rejection of claims 10-11 for being obvious under 35 U.S.C. § 103(a) in view of Unicharm, Matsuda et al., and Poulsen.

VII. ARGUMENT

A. Claims 1-3, 6, 9, 12-14, and 18-22 are patentable over Uni-Charm and Matsuda

Independent claims 1, 12, and 19 each require “at least one water insoluble continuous fluid impermeable delay layer” which is “adapted to substantially affect the flow of fluid passing through the insert.”

Uni-Charm admittedly fails to disclose this cited feature of the claimed invention. Uni-Charm discloses a first absorbent article to be worn inside of

another absorbent article/disposable diaper. The first absorbent article is designed to prevent excess liquid from flowing to the side or periphery of the disposable diaper by including a liquid impermeable back-sheet with “at least one opening made therein” (col. 2, l. 23-35) or a “liquid-permeable backing layer which faces the another absorbent article in use.” Importantly, the Uni-Charm insert is designed to allows fluid to pass through to the center of the disposable diaper, presumably straight through the center of the first absorbent insert. (col. 1, l. 37-47). Nowhere does Uni-Charm suggest using a delay layer in the first absorbent article to “substantially affect the flow of fluid passing through the insert.”

Indeed, the Examiner concedes that Uni-Charm fails to disclose the continuous fluid impermeable delay layer. (Final Office Action dated Jan. 26, 2005, p. 3). In order to overcome the deficiencies of Uni-Charm, however, the Examiner relies on Matsuda et al. as providing motivation to alter Uni-Charm’s absorbent insert to include fluid impermeable delay layers. Appellants disagree. One of ordinary skill in the art, reading Matsuda et al., would not be motivated to modify Uni-Charm to include each element of the claimed invention.

Matsuda et al. is directed to an absorbent article that is used independently of any other absorbent device. The Matsuda et al. absorbent article includes a waterproof strip 10 that is approximately as wide as or wider than the absorbent layers. (col. 1, l. 42-col. 2, l.1). This strip prevents the article from allowing the “fluid to pass therethrough to said absorbent garment.” (Claim 1). Nowhere does Matsuda et al. disclose or suggest using the absorbent article as required by the rejected claims. Moreover, it would not have been obvious to alter Uni-Charm so that it includes barrier layers disclosed is Matsuda et al.. As noted in MPEP 2143.01, with reference to *In re Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990):

The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art suggests the **desirability** of the combination. [Bold emphasis added]

Moreover, the mere fact that the combination of references teaches every element of the claimed invention, without motivation to combine, is insufficient to establish a *prima facie* case of obviousness. MPEP 2143.01, with reference to *In re Rouffet*, 149 F.3d 1350, 1357 (Fed. Cir. 1998).

The Office Action states that it would have been obvious to modify Uni-Charm because “Unicharm teaches that it is desirable for the removable or replaceable insert or napkin to entirely absorb the received fluid allowing continuous usage of the undergarment underneath...” (Final Office Action dated Jan. 26, 2005, p. 3). However, Uni-Charm was trying to solve the problem of fluid leakage around the periphery of the absorbent insert. (col. 1, l. 37-47). Uni-Charm solves that problem by removing a fluid impermeable layer between the absorbent layers of the first and second absorbent articles.

On the other hand, the Matsuda et al. barrier layers promote the lateral movement of fluid through the absorbent insert. This lateral movement of fluid is opposite of what Uni-charm desires. When liquid contacts the surface of the Matsuda et al. napkin the liquid penetrates downwardly to the barrier sheet where it spreads laterally and longitudinally along the barrier sheet, toward the periphery of the napkin. (col. 2, l. 18-22). One of ordinary skill in the art would not have been motivated by Matsuda et al. to modify the teachings of Uni-Charm. The Office Action provides no other evidence of motivation to combine the references. Therefore the proposed combination is not tenable.

For the above reasons, the rejection of claims 1, 12, and 19 are improper and should be withdrawn. Claims 2-3, 6, 9, 13-14, and 20-22 each depend directly on claims 1, 12, or 19 and so their rejections should be withdrawn for the same reasons stated above with respect to claims 1, 12, and 19.

B. Claims 10 and 11 are patentable over Matsuda, Uni-Charm, and Poulsen

Claims 10 and 11 depend directly on claim 1. Independent claim 1 requires “at least one water insoluble continuous fluid impermeable delay layer” which is “adapted to substantially affect the flow of fluid passing through the insert.” As pointed out above in Section A, there is no motivation to combine the teachings of Uni-Charm and Matsuda et al. Poulsen does not satisfy this deficiency.


Poulsen discloses “a sanitary napkin comprising a number of layers of liquid absorbing material” (col. 1, l. 15-16). More particularly, Poulsen teaches an absorbent napkin capable of being worn, one on top of another, so that “only the innermost layer will in the first instance serve to absorb the menstrual discharge and, when convenient, the used layer can be torn off whereupon the subsequent layer will appear clean and ready for use” (col. 1, l. 51-55). Therefore, Poulsen does not teach or suggest modifying Matsuda et al. and/or Uni-Charm to provide the claimed “at least one insoluble continuous fluid impermeable delay layer” “adapted to substantially affect the flow of fluid passing through the insert.” Instead, Poulsen teaches exactly the opposite. Accordingly, one skilled in the art, reading Poulsen, would be led away from the claimed structure.

Therefore, the Office Action fails to establish a *prima facie* case of obviousness and the rejection should be withdrawn.

VIII. CONCLUSION

The cited references in combination with the Examiner's assertions do not establish a *prima facie* case of obviousness. Accordingly, the rejection should be REVERSED.

Respectfully submitted,

A handwritten signature in black ink that reads "Amanda M. Church". The signature is written in a cursive style with a horizontal line underneath the name.

Amanda M. Church
Registration No. 52,469
Attorney for Appellants

BRINKS HOFER GILSON & LIONE
P.O. BOX 10395
CHICAGO, ILLINOIS 60610
(312) 321-4200

IX. CLAIMS APPENDIX

1. An absorbent insert for use with an absorbent garment configured to allow fluid to pass therethrough to said absorbent garment, the insert comprising:

a body-facing outer surface and a garment-facing outer surface, said garment-facing outer surface being at least partially fluid permeable and having a pore size that will readily allow the passage of liquids therethrough;

at least one absorbent layer having a first primary surface and a second primary surface; and

at least one water insoluble continuous fluid impermeable delay layer adapted to substantially affect the flow of fluid passing through the insert, said at least one continuous fluid impermeable delay layer having a first primary surface and a second primary surface;

wherein the surface area of each of said primary surfaces of said at least one water insoluble continuous fluid impermeable delay layer is less than the surface area of each of said primary surfaces of at least one of the said at least one absorbent layers; and

wherein said at least one delay layer is positioned between said at least one absorbent layer and said garment-facing outer surface.

2. The absorbent insert of claim 1, wherein said at least one delay layer is adapted to substantially change the flow direction of fluid passing through the insert.

3. The absorbent insert of claim 1, wherein said at least one delay layer is adapted to partially inhibit the flow of fluid through the insert.

4. (Cancelled).

5. (Cancelled).

6. The absorbent insert of claim 1, further comprising a first cover layer and a second cover layer, said body-facing outer surface comprising a surface of said first cover layer, said garment-facing outer surface comprising a surface of said second cover layer, said at least one delay layer positioned between said first cover layer and said second cover layer.

7. (Cancelled).

8. (Cancelled).

9. The absorbent insert of claim 22, wherein said attachment portion comprises an adhesive zone adapted to removably attach the insert to the absorbent garment.

10. The absorbent insert of claim 1, wherein said at least one absorbent layer comprises a first absorbent layer and a second absorbent layer, each primary surface of said first absorbent layer having a surface area less than the surface area of each primary surface of said second absorbent layer.

11. The absorbent insert of claim 10, wherein said second absorbent layer is positioned between said at least one delay layer and said first absorbent layer.

12. An absorbent insert for use with an absorbent garment, the insert comprising:

a body-facing cover layer and a garment-facing cover layer, said garment-facing cover layer being at least partially fluid permeable and having a pore size that will readily allow the passage of liquids therethrough;

at least one absorbent layer having a first primary surface and a second primary surface, said at least one absorbent layer positioned between said body-facing cover layer and said garment-facing cover layer; and

at least one water insoluble continuous fluid impermeable delay layer having a first primary surface and a second primary surface, said at least one continuous fluid impermeable delay layer adapted to substantially affect the

flow of fluid through the insert, said continuous fluid impermeable delay layer positioned between said body-facing cover layer and said garment-facing cover layer;

wherein the surface area of each of said primary surfaces of said at least one continuous fluid impermeable delay layer is less than the surface area of each of said primary surfaces of at least one of the said at least one absorbent layer; and

wherein said absorbent insert is configured to allow fluid to pass therethrough to said absorbent garment.

13. The absorbent insert of claim 12, wherein said at least one delay layer is adapted to substantially change the flow direction of fluid passing through the insert.

14. The absorbent insert of claim 12, wherein said at least one delay layer is adapted to partially inhibit the flow of fluid through the insert.

15. (Cancelled).

16. (Cancelled).

17. (Cancelled).

18. The absorbent insert of claim 12, further comprising an intake layer between said at body-facing cover layer and said at least one absorbent layer.

19. An absorbent system comprising:

an absorbent garment adapted to be worn by a user, said absorbent garment having a body-facing surface and an outward-facing surface; and

an absorbent insert for use with the absorbent garment, said insert being configured to allow the passage of fluid therethrough to said absorbent garment and including:

a body-facing outer surface and a garment-facing outer surface, said garment-facing outer surface being at least partially fluid permeable and having a pore size that will readily allow the passage of liquids therethrough;

at least one absorbent layer having a first primary surface and a second primary surface; and

at least one water insoluble continuous fluid impermeable delay layer adapted to substantially affect the flow of fluid passing through the insert, said at least one continuous fluid impermeable delay layer having a first primary surface and a second primary surface;

wherein the surface area of each of said primary surfaces of said at least one continuous fluid impermeable delay layer is less than the surface area of each of said primary surfaces of at least one of the said at least one absorbent layer; and

wherein said at least one delay layer is positioned between said at least one absorbent layer and said garment-facing outer surface.

20. The absorbent system of claim 19, wherein the absorbent insert further comprises an attachment portion adapted to removably attach said absorbent insert to said absorbent garment.

21. The absorbent insert of claim 12, wherein said garment-facing cover layer further comprises an attachment portion adapted to removably attach the insert to an absorbent garment.

22. The absorbent insert of claim 1, further comprising an attachment portion adapted to removably attach said insert to said absorbent garment.

X. **EVIDENCE APPENDIX**

None.

XI. RELATED PROCEEDINGS APPENDIX

None.